

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII
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5 WAYNE BERRY,)
6 Plaintiff,) CIVIL NO. 01-00446SPK-LEK
7 vs.)
8 FLEMING COMPANIES, INC.,)
9 aka FLEMING FOODS, INC.,)
10 aka FLEMING, DOE)
11 INDIVIDUALS 1-50 and)
12 DOE PARTNERSHIPS,)
13 CORPORATIONS and OTHER)
14 ENTITIES 1-20,)
15 Defendants.)
16 _____
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18 TRANSCRIPT OF PROCEEDINGS

19 The above-entitled matter came on for Further
20 Jury Trial commencing at 10:00 a.m. on Tuesday, March
21 4, 2003, Honolulu, Hawaii,
22

23 BEFORE: HONORABLE SAMUEL P. KING
24 United States District Judge
25 District of Hawaii

26 REPORTED BY: LISA J. GROULX, COURT REPORTER
27 Notary Public, State of Hawaii

EXHIBIT 

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A P P E A R A N C E S

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6 FOR PLAINTIFF: TIMOTHY J. HOGAN, ESQ.

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13 FOR DEFENDANTS: LEX R. SMITH, ESQ.

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ANN TERANISHI, ESQ.

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Kobayashi, Sugita & Goda

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23 ALSO PRESENT: Ralph Stussi

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I N D E X

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5 DEFENDANT'S WITNESSES:

PAGES

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7 JACK BORJA

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Direct examination by Mr. Smith

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Cross-examination by Mr. Hogan

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12 TERESA NOA

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Direct examination by Mr. Smith

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Cross-examination by Mr. Hogan

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Redirect examination by Mr. Smith

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18 REBUTTAL WITNESSES:

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WAYNE BERRY

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Direct examination by Mr. Hogan

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22 EXHIBITS:

MARKED

RECEIVED

23

(None.)

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1 MR. HOGAN: Nothing else, Your Honor.

2 MR. SMITH: No. Fleming rests, Your
3 Honor.

4 THE COURT: You may step down, ma'am.

5 (Witness excused 11:55 a.m.)

6 THE COURT: You've got a rebuttal
7 witness ready?

8 MR. HOGAN: Yes, Your Honor. Calling
9 Wayne Berry for rebuttal.

10 THE COURT: You are reminded you're
11 still under oath, Mr. Berry. Just state your name
12 again for the record.

13 THE WITNESS: Wayne Berry.

14 DIRECT EXAMINATION

15 BY MR. HOGAN:

16 Q. Good morning, Mr. Berry.

17 A. Good morning.

18 Q. Mr. Berry, prior to November 27th, 1999, or
19 November 26th, '99, had you ever informed Fleming that
20 you did not consider your end user license agreement,
21 Exhibit 53, to be enforced?

22 A. I never rescinded that agreement, no.

23 Q. Prior to that time, you never rescinded it?

24 A. No.

25 THE COURT: Did they ever agree to it?

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1 THE WITNESS: By using the software they
2 agreed to it, yes.

3 THE COURT: So who drew it up, by the
4 way?

5 THE WITNESS: I did.

6 THE COURT: You got it off the usual end
7 user licensing agreement off the boxes that you buy?

8 THE WITNESS: Off several boxes, yes.

9 THE COURT: But on those, it goes down
10 to the point where it says you have to accept before
11 you can use the program and if you don't say I accept
12 then you can't get the program.

13 THE WITNESS: That is in the
14 installation of the software itself.

15 THE COURT: Right.

16 THE WITNESS: I had installed the
17 software at Fleming.

18 THE COURT: Right. You didn't have an
19 end user licensing agreement when it was first
20 installed.

21 THE WITNESS: Shrink wrap licenses can
22 be on the box itself. There's a lot of software --

23 THE COURT: Do you think that this bound
24 them after you had already installed it and they had
25 already used it?

1 THE WITNESS: Yes, it did.

2 THE COURT: That's what you say.

3 THE WITNESS: Yes. And I left it open
4 to them so they could modify it.

5 THE COURT: Even though they said they
6 disagree with it.

7 THE WITNESS: Pardon me?

8 THE COURT: Even though they said they
9 don't accept it.

10 THE WITNESS: Well, they didn't accept
11 part of it. They wanted changes, which I was open to.
12 And I did make changes.

13 THE COURT: They said they wanted
14 changes?

15 THE WITNESS: They wanted to be able to
16 make and modify Crystal Reports.

17 THE COURT: They didn't say it was
18 totally unacceptable?

19 THE WITNESS: No.

20 THE COURT: Okay.

21 Q. (By Mr. Hogan) So looking at this document,
22 Mr. Berry, Exhibit 53, I believe His Honor was just
23 discussing the idea that you had language in here that
24 said that if you use the software you agree; isn't
25 that correct?

1 A. Yes.

2 Q. Did Fleming ever tell you that they had
3 stopped using your software?

4 A. No.

5 Q. Now I'd like you to look at 137.

6 A. It only goes up to 136.

7 Q. Oh, sorry.

8 THE COURT: Which one is it?

9 (Counsel conferring.)

10 MR. HOGAN: I believe this is in as 137,
11 which is the letter dated November 1st, 2001.

12 THE CLERK: Yes, it is.

13 Q. (By Mr. Hogan) I'll put it up on the board,
14 Mr. Berry. This letter, dated November 1st, 2001, at
15 any time did you rescind or intend to rescind all of
16 Fleming's licenses to use the software?

17 A. Yes.

18 Q. And was this the letter that you --

19 THE COURT: I think you better --
20 attempt to rescind it.

21 Q. (By Mr. Hogan) Well, was it your intention to
22 rescind it?

23 A. Yes.

24 Q. And did you in fact rescind it in this
25 letter?

1 A. Yes, I did.

2 MR. SMITH: Calls for a legal
3 conclusion, Judge.

4 THE COURT: Yes, it does.

5 Q. (By Mr. Hogan) But was it your intention to
6 rescind it?

7 A. Yes.

8 Q. Have you ever been told by Fleming that they
9 had stopped using your software after November 1st,
10 2001?

11 THE COURT: Did you sign 137 or was that
12 Hogan who signed it?

13 THE WITNESS: Mr. Hogan drafted it. I
14 watched him sign it and he sent it for me, yes.

15 THE COURT: November 1st, 2001, signed
16 by Mr. Hogan. Yeah, okay.

17 Q. (By Mr. Hogan) Now is it your understanding,
18 from discussions with Mr. Stussi, after November 24th,
19 1999, that he had read the EULA?

20 A. Yes.

21 Q. And why do you say that, sir?

22 A. Well, the fact that he was discussing
23 components of the EULA, talking about the changes that
24 he needed to make, like with regards to Crystal
25 Reports.